approving the application by the plaintiff's solicitor for postponement of the case he struck out the case at the same time for he should have adjourned the case to another date, and disregarded the absence of the plaintiff/respondent. If he had refused a request for adjournment, (which he did not), then he should have dismissed the action with costs instead of striking out the action.

The learned Magistrate had treated the case on the basis that he had dismissed the claim of the plaintiff/respondent in default of appearance, for in his grounds, he stated that he was satisfied with the due cause shown for absence and the good cause of action of the plaintiff. I cannot find anything wrong with the basis or materials before him for him to be so satisfied, subject to what I have to say in a moment.

Under the Subordinate Courts Rules, 1980, the procedure and practice of applying to set aside a judgment in default of appearance in the subordinate courts have been brought in line with those in the High Court so that the requirement of "good reason for absence be shown" mentioned in the repealed Subordinate Courts Rules, 1950, is no longer insisted on as a prerequisite, together with the usual affidavit of merits in an application to set aside judgment or order made in default of appearance.

In the circumstances of this case, I therefore dismiss the appeal with no order as to costs in this appeal but that the plaintiff/respondent shall pay all the costs thrown away on 7.5.82 and all costs of application for "reinstatement" dated 28.6.82. I further direct that Tampin Magistrate's Court Civil Action No. 43 of 1981 be fixed for hearing early.

Order accordingly.

Solicitors: *Tay Leong Siak & Co., Sri Selvarajah and Nirmala.*

BRUNEI REPORT

SWEE PTE. LTD. v. LIM KIAN CHAI & ANOR.

[O.C.J. (Rhind J.) April 3, 1982]

[Bandar Seri Begawan – Suit No. 175 of 1981]

Arbitration – Building contract – Dispute – Application for stay of proceedings in favour of arbitration – Applicability of English Arbitration Act 1950 in Brunei.

The plaintiffs erected a bottling plant for the defendant under a written contract dated July 27, 1977. By a Writ dated November 10, 1981, the plaintiff claimed $21,836 from the defendants for work done under the contract or, on a *quantum meruit* basis. The defendant applied by motion that all further proceedings in the action be stayed pursuant to Clause 38 of the Contract, the plaintiff and the defendants having allegedly agreed to refer to arbitration the matters in respect of which this action is brought.

The facts revealed that when the architect issued his final certificate on December 1, 1978, it showed that the final cost of the job was $336,722, and that the final balance due from the defendants to the plaintiff was $35,025.75. The defendants, however, paid the plaintiff B$13,189.75 leaving the balance of B$21,936 unpaid.

Held, dismissing the defendants' motion: (1) the English Arbitration Act 1950 applies in Brunei;

(2) the architect was not an arbitrator. Hence the provision for the architect to determine disputes between the parties was not an agreement to arbitrate, so that even if the architect had not determined the dispute as clause 38 provided, that would not afford the defendants any ground for a stay;

(3) the court is only given power to stay an action in breach of an arbitration clause. The plaintiffs in this case had done nothing to put themselves in breach of clause 38;

(4) only the plaintiffs could invoke arbitration and thus make arbitration available as an alternative to litigation. Resort to arbitration was plainly unilateral and there was simply no arbitration provision on which the defendants could rely. The right to arbitration rested exclusively in agreement.

Cases referred to:

(1) *Hoffman* v. *Meyer* Hudson's Building and Engineering Contract 10th edn. page 164; 1956(2) S.A. 752.

(2) *Ballantine* v. *Western Hotels (Pty.) Ltd.* Hudson's Building and Engineering Contract 10th edn. page 444; 1960(4) S.A. 137

CIVIL SUIT.

Y.Y. Chin for the plaintiffs.

V. Kumar (*Ronnie Lee* with him) for the defendants.

Cur. Adv. Vult.

Rhind J.: The plaintiff company, which is a builder, has erected a Pepsi Cola bottling plant for the defendants under a written contract dated July 27, 1977 (hereafter referred to as "the contract"). By a Writ dated November 10, 1981, the plaintiff commenced the present action, claiming the sum of $21,836 from the defendants for work done under the contract or, alternatively, on a *quantum meruit* basis. The defendants, who have taken no step in the action beyond filing an unconditional appearance, now apply by the present motion that all further proceedings in this action be stayed pursuant to Clause 38 of the Contract, the plaintiff and the defendants having allegedly agreed to refer to arbitration the matters in respect of which this action is brought. The plaintiff resists this motion.

The Contract

A copy of this is to be found exhibited to an affidavit made by the defendants' advocate on March 4, 1982.

By that contract, in which the plaintiff is referred to as "the Contractor", and the defendants as "the Employer", the defendants agreed to pay the plaintiffs the sum of $297,673 for the work, or such other sum as should become payable in the manner specified in the Conditions of the Contract. It was clear that $297,673 was to be the basic price, but that figure was open to revision for authorised variations.

The architect designated under the contract was Akitek Bersatu (hereafter referred to as "the Architect"). As will shortly be seen, he was specifically empowered by the contract to authorise variations, and needless to say, the contract also provided that such variations had to be paid for.

I will now set out so much of Condition 1 of the contract as touches upon variations.

1.(a) The Contractor shall carry out and complete the works in accordance with this contract in every respect in accordance with the directions and to the reasonable satisfaction of the Architect, who may in his absolute discretion and from time to time issue further drawings, details, and/or written instructions, written directions and written explanations (all of which are hereafter collectively referred to as "Architect's Instructions") in regard to:

(i) the variation or modification of the design, quality or quantity of the works or the addition or omission or substitution of any works;

(b) The Contractor shall forthwith comply with and duly execute any work comprised in such Architect's Instructions provided that verbal instructions, directions and explanations given to the Contractor or his foreman upon the works by the Architect shall, if involving a variation, be confirmed in writing to the Contractor by the Architect within seven days and, if not dissented from in writing within a further seven days to the Architect by the Contractor, shall be deemed to be Architect's Instructions. If compliance with Architect's Instructions as aforesaid involves any variation such variation shall be dealt with under Clause 13 hereof as an authorised variation and the value thereof added to or deducted from the Contract Sum.

(c) If compliance with the Architect's Instructions as aforesaid involves expense or loss beyond that reasonably contemplated by the contract then, unless the same were issued owing to some breach of this contract by the Contractor, the amount of such expense or loss shall be ascertained by the Architect and added to the Contract Sum.

Next, I will set out so much of Conditions 12 and 13, entitled *"Variations and extras"* and *"Payment for variations and extras; Final measurement"*, respectively, as are relevant.

12.(a) The Architect may at any time during the progress of the works, by order in writing under his hand, make or cause to be made any variations from the original Drawings and Specification by way of addition or omission or otherwise deviating therefrom and the said works shall be executed according to the said variations or deviations under his direction and to his satisfaction as if the same had been included in the said original Drawings and Specification; and any work or materials which shall be ordered not to be done or used shall be omitted or shall not be used by the Contractor.

(b) The Architect shall have the right by varying the Drawings and Specification as provided in the last preceding sub-clause to increase or decrease the quantities of any item or items, or to omit any item or items or to insert any additional item or items without the consent of the Contractor.

13.(a) No variation shall vitiate this contract. All variations and extras, authorised as herein provided, or subsequently sanctioned by the Architect in writing shall be measured by the Architect and the Contractor shall be given the opportunity of being present during such measuring and taking such notes and measurements as he requires. The Contractor shall be supplied with a copy of the measured bill on or before the date of the Architect's certificate in respect of such variations and extras and the valuation thereof, unless previously or otherwise agreed, shall be made in accordance with the following rules:

(i) The rates in the original Schedule of Rates shall determine the valuation of extra work of similar character executed under similar conditions as work priced therein;

(ii) the said rates, where extra works are not of a similar character or executed under similar conditions as aforesaid, shall be the basis of rates for the same so far as may be reasonable; failing which, a fair valuation

thereof shall be made based upon rates for similar work in the locality current at the time the extra works are executed.

(b) The Contractor shall submit claims for any work or circumstances on account of which he may consider that he is entitled to extra payment within one week from the time of the commencement of such work or occurrence of such circumstance and all such claims must be accompanied by full particulars and must state under which provision of the Contract it is claimed that payment shall be made.

(c) The amount to be allowed on either side in respect of variations and extras, ascertained as above described, shall be added to or deducted from the Contract Sum, as the case may be.

(d) The measurements and valuations of the works shall be completed within the "Period of Final Measurement" stated in the Appendix or if not so stated then within three months of the completion of the works. Interim measurements and valuation shall be made whenever necessary to enable the Architect to issue certificates under Clause 36 hereof.

After that, I will jump to Condition 36, *"Progress payments"*, of which the following parts need to be set out.

36.(a) When work to the value of the sum referred to in the Appendix (or less at the discretion of the Architect) has been executed by the Contractor in accordance with the terms of this contract the Architect shall at that time and once (or more often at the discretion of the Architect) during the course of each succeeding month issue to the Contractor a certificate showing the estimated total value of the work done up to the date of such certificate.

(c) Within a number of days not exceeding that referred to in the Appendix of the issue of any such certificate the Employer will make a payment to the Contractor in connection with the work and/or materials referred to in that certificate.

(f) No certificate of the Architect shall be considered conclusive evidence as to the sufficiency of any work or materials to which it relates nor shall it relieve the Contractor from his liability to amend and make good all defects, shrinkages, other faults or damage as provided by this contract.

In conjunction with Condition 36(c), reference has also to be made to the Appendix which shows, "Period for Honouring of Certificate: 14 days".

Lastly, attention can be turned to Condition 38 – *Arbitration.*

I now set out the whole condition, but with the parts emphasised which I regard as significant for the disposal of the present case.

38. *Provided always that in case any dispute or differences* except a dispute or difference as to rates of wages or conditions of employment of workmen employed by the Contractor in and for the purpose of this contract including workmen employed by nominated sub-contractors and by authorised sub-contractors engaged directly by the Contractor *shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after completion of the works or after the determination,* abandonment or breach *of the contract, as to the construction of the contract or as to any matter or thing arising thereunder* or as to the withholding by the Architect of any certificate to which the Contractor may claim to be entitled, *then the Architect shall determine such dispute or difference by a written decision given to the Contractor. The said decision shall be final and binding on the parties unless the Contractor within 14 days of the receipt thereof by written notice to the Architect dispute the same in which case or in case the Architect for 14 days after a written request to him by the Contractor fails to give a decision as aforesaid, such dispute or difference shall be referred to the arbitration and final decision of a person nominated and appointed by agreement between the Architect and the Contractor or, in the event of his* death or *unwillingness or inability to act or if the Architect and Contractor fail to agree, an arbitrator will be nominated by the President of the Singapore Institute of Architects and the award of such Arbitrator shall be final and binding on the parties.* Such reference, except on the question of certificates, shall not be commenced until after the completion or alleged completion of the works, unless with the written consent of the Architect and the Contractor. The Arbitrator shall have power to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given. Upon every or any such reference the costs of and incidental to the reference and award shall be in the discretion of the Arbitrator, who may determine the amount thereof or direct the same to be taxed as between solicitor and client or as between party and party and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to arbitration within the meaning of any Arbitration Ordinance for the time being in force in the State.

The Factual Position

This has been ascertained from the affidavits and accompanying exhibits.

When the Architect issued his final certificate on December 1, 1978, it showed that the final cost of the job was $336,722, and that the final balance due from the defendants to the plaintiff was $35,025.75. In accordance with Condition 36(c) and the provision in the Appendix about honouring certificates, that balance should have been paid by the defendants within 14 days. Instead of that, the defendants did nothing.

Six months later, on May 26, 1979, the plaintiff's advocates wrote to the defendants' agents,

demanding payment of this $35,025.75, and threatening proceedings in default of payment.

The defendants' agents replied on June 16, 1979. I set out so much of the reply as is relevant:

"We do not agree with the sum specified, however, we list hereunder few items of our deduction for your kind perusal:

1) $1,700.00 Lay floor tile with epoxy) This should be the offset against
2) $594.00 Lay skirting) the delection of use of acid
3) $18,742.00 Extra epoxy used:) proof flooring items.
we do not agree with this item. However, we need proof of usage, as we did not know the extra epoxy required.
4) $800.00 Use of shovel to fill back of site sufficient for access road:
This item was already included in the contract.

We send you herewith our Cheque No. 677800 amounting to B$13,189.75 being settlement of our account."

That letter was copied at the same time to the Architect who thus became aware of the dispute between the parties.

There next came the plaintiff's advocate's reply, dated August 17, 1979 to the defendants' agents' letter of June 16, 1979. I quote from it:

"Our instructions are that our clients had duly completed the works and the sum payable and due to them are duly certified by the Architects. In the circumstances, there is no question of any deduction whatsoever.

Our clients will keep the sum of $13,189.75 as part payment by you without prejudice to this claim for the balance in the sum of $21,936.00 due and payable by you.

As instructed by and on behalf of our clients, we demand payment by you of the said balance in the sum of $21,936.00. Unless payment is received within 14 days from date hereof, our clients shall be constrained to institute legal proceedings for the recovery thereof which we trust will not be necessary."

From that letter it will be seen that the plaintiff was demanding the sum of $21,936, the amount now claimed by the Writ in this action.

That letter evoked the following reply, dated September 24, 1979 from the defendants' agents:

"This refers to your letter of 17/8/79 regarding the above.

We wish to clarify to you that the amount of $21,936.00 is not in our contract and was certified by Akitek Bersatu as extra work. Please note that we have no knowledge of the said extra use of epoxy at all and the Akitek Bersatu may wrongly certify the payment as we are neither advised nor we give any instruction to Akitek Bersatu for this extra use of epoxy.

We shall therefore be grateful if you will kindly refer this matter to Akitek Bersatu at your earliest convenience."

The defendants copied that letter to the Architect. In the event it did not prove necessary for the plaintiff to refer the matter to the Architect.

Without any further reference from the parties, the Architect took the initiative by intervening in their dispute. He did so by writing a letter, dated November 29, 1979, to the plaintiff's advocates as follows:

"We are in receipt of a copy of a letter to you from Chin Kian Industrial and Commercial Co. Ltd. dated September 24, 1979.

We set out below the facts with regard to the epoxy flooring.

The original contract allowed for a cheap trowelled VEPOX finish to the floors and drains.

The client changed his mind and instructed us to use expensive quarry tiles for the floor. The tile suppliers also supplied some epoxy cement for the joints.

We instructed Swee to bed the tiles in epoxy as well as jointing them in epoxy. We did this because of our past experience on similar food factories where using just a cement bed caused later problems. Mr. Lim Kian Chai knew of our instruction but changed his mind when the flooring was partly complete and he saw how much epoxy material was being used. He instructed Swee to complete the floor with epoxy joints only. This was done, however all the floor channels and drains had to be coated in epoxy as the quarry tiles were unsuitable. These drains accounted for the large amount of material used as it is very difficult to work and has a large wastage factor.

Mr. Lim observed this work being done and saw the large number of epoxy pails on site. Our Clerk of Works checked the number of pails used.

We believe that Swee executed the work in good faith and that they should be paid the amount they claimed."

Hardly surprisingly, the plaintiff was wholly satisfied with the Architect holding so completely in its favour, and, through its advocates, consequently wrote to the defendants' agent, enclosing a copy of the Architect's letter and reiterating the demand for payment of the $21,836 due.

In the face of the defendants' continued failure to pay, the Writ already referred to was in due course issued.

Does the court in Brunei have power to order a stay of proceedings in favour of arbitration?

It was urged on behalf of the defendants that the provisions of England's Arbitration Act 1950,

empowering a stay, are operative in Brunei by virtue of section 2 of the Application of Laws Enactment which was passed in 1951.

Section 2 is as follows:

"Subject to the provisons of this Enactment and save in so far as other provision has been or may hereafter be made by any written law in force in the State, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement of this Enactment, shall be in force in the State:

Provided that the said common law, doctrines of equity and statutes of general application shall be in force in the State so far only as the circumstances of the State and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary."

In my opinion, the defendants are correct in this contention. England's Arbitration Act 1950 should, I think, be counted among "statutes of general application", there being nothing about it to indicate that it is only appropriate to the peculiar circumstances operating in England. It strikes me as a piece of legislation well suited for export. Moreover, there is nothing in Brunei's circumstances of which I am aware which would make it necessary to circumscribe in any way the operation in Brunei of the parts of the Arbitration Act 1950 on which the defendants want to rely. There was no substance in the point urged on me by the plaintiff's advocate that the Arbitration Act 1950 cannot be said to be a statute "of general application", because it does not extend to Northern Ireland or Scotland. The short answer to that is that section 2 of the Application of Laws Enactment is only concerned with statutes, "in force in England".

A point made by the plaintiff's advocate which occasioned me greater pause for reflection was whether Brunei's written law already makes provision for arbitration. True, Brunei has no specific arbitration enactment of its own, unlike its neighbours such as Sabah and Sarawak, but, nonetheless, as Mr. Chin for the plaintiff pointed out, Brunei does have the Contracts Enactment 1957, and an arbitration clause is a species of contract.

My view is that a piece of Bruneian legislation on contracts generally, such as the Contracts Enactment 1957 does not supersede a piece of English legislation dealing with a special type of contract. There is no inconsistency between the two pieces of legislation, which can happily co-exist. I do not think it can be said that the Contracts Enactment 1957 makes "other provision" for arbitration.

It was likewise urged on behalf of the plaintiff that Brunei's Specific Relief Enactment 1957 embodies written law making "other provision" for arbitration.

The particular part of the Specific Relief Enactment 1957 on which the plaintiff relies is the final sentence of section 20:

"And, save as provided by the law relating to civil procedure in force in the State of Brunei no contract to refer a controversy to arbitration shall be specifically enforced."

Far from being a provision inconsistent with England's Arbitration Act 1950, that part of the Specific Relief Enactment 1957 just cited is no more than declaratory of what is in fact the common Law of England on arbitration clauses. Paragraph 385 of Vol. 36 of *Halsbury's* Laws of England (3rd Ed.) states

"The court does not enforce the specific performance of agreements to refer to arbitration."

That same paragraph continues, though:

"An indirect method of enforcing performance of such an agreement is, however, provided by the Arbitration Act 1950 which gives the court discretion to stay an action in respect of any dispute which the parties have by writing agreed to refer to arbitration."

Thus, the inability specifically to enforce an arbitration agreement in England is no obstacle to a stay of proceedings. In fact the very reason the courts in England can allow a stay is because arbitration clauses are not specifically enforceable.

By a parity of reasoning, I see no incompatability between a prohibition in Brunei on specifically enforcing a contract to arbitrate, while at the same time permitting the courts in Brunei to order a stay of proceedings where a contract to arbitrate exists.

The upshot of all this is that I hold the English Arbitration Act 1950 applies in Brunei.

I will now set out in full section 4(1), on which the defendants have based their present motion to stay:

"Staying court proceedings where there is submission to arbitration

If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Are the proceedings in relation to a dispute agreed to be referred to arbitration?

Unless that question is answered in the defendants' favour, there can be no scope for a stay of proceedings. See *Russell* (16th Edition, which was the latest available to me) at pages 63 and 66.

I do not think it could be realistically argued that Condition 38 contemplates that the Architect himself is to play the role of an arbitrator when it states ... "then the Architect shall determine such dispute".

Plainly, to my mind, the role contemplated for the Architect by Condition 38 is that he should have at most what is described as the "quasi-arbitral" status of a certifier or valuer. The Architect's decision is sought as a preliminary to arbitration: See *Hudson's* Building and Engineering Contracts, 10th Edition at pages 159-161; 435-436; 499-503; and 819-821.

If the contract had intended that the Architect was to be an arbitrator, Condition 38 would surely have stated explicitly that he was to be an arbitrator. There are references in Condition 38 to "the Arbitrator" with a capital "A". One only has to consider the elaborate provisions specified in relation to the arbitration to be carried out by the Arbitrator, as appointed under Condition 38, to realize that it could never have been meant that the Architect was to be an arbitrator by implication. Why go to all that trouble to specify what was required of the Arbitrator appointed under Condition 38, but remain silent about the Architect in this regard? The answer is that no one ever intended the Architect to be an arbitrator (with all that implies e.g. conducting judicial hearings, being liable to state a case on a point of law etc.).

I unhesitatingly hold that the Architect is not an arbitrator. Hence the provision for the Architect to determine disputes between the parties is not an agreement to arbitrate, so that even if the Architect had not determined the dispute as Condition 38 provided, that would not afford the defendants any ground for a stay.

In actual fact, though, I think the Architect has already fulfilled the function expected of him by Condition 38. He was aware of a dispute between the parties on a matter arising under the contract, i.e. whether the defendants owed the amount claimed for variations, and he has determined that dispute by a written decision given to the plaintiff (Contractor) i.e. by the letter of November 29, 1979 to the plaintiff's advocate.

Condition 38 lays down no formal procedure for referring a dispute to the Architect, nor does it require his decision to be in any particular form, beyond being in writing. True, in a letter dated March 4, 1982 in reply to a whole series of interrogatories set out in a letter from the defendants' advocates dated March 4, 1982, the Architect expressed the opinion that he had not given a written decision to the contractor. Whether or not he has given a written decision to the contractor is for me to determine as a question of law, and the Architect's opinion, with all due respect to him, is neither here nor there. A point made about the writing not having been sent to the contractor when it had been sent to the contractor's advocate is pure pettifoggery. Unwittingly, the Architect has allowed himself to be drawn on what are essentially questions of law.

I will have more to say about the defendants' advocate's letter of March 4, 1982 and the Architect's reply in due course.

On the view I take of Condition 38, arbitration can only ever arise under it in two sets of circumstances, and in both cases, only at the instigation of the plaintiff.

First, there can be arbitration if within 14 days of receipt of a written decision given to the plaintiff by the Architect, the plaintiff by written notice disputes it. It so happens, for reasons I have already expressed, I take the view that the Architect has in fact determined the dispute between the parties by giving the plaintiff a written decision wholly in the plaintiff's favour. As the plaintiff got everything he wanted, the question of disputing that decision never arose, but saying it had, the fourteen days for the plaintiff

disputing that decision would have elapsed by mid-December 1979. The second set of arbitrable circumstances occurs when the Architect for fourteen days after a written request to him by the plaintiff fails to give a decision. That has not happened here and there is no way the defendants can cause it to happen.

The court is only given power to stay an action brought in breach of an arbitration clause: *Russell, op. cit.* at 60. The plaintiff has done nothing to put itself in breach of Condition 38.

Only the plaintiff can invoke arbitration and thus make arbitration available as an alternative to litigation. Resort to arbitration is plainly unilateral and there is simply no arbitration provision on which the defendants can rely.

The defendants' advocate in a letter dated March 6, 1982 to the plaintiff's advocate laments how unfair this all is. He expresses doubts about the validity of Condition 38, "as it clearly violates the elementary principle of natural justice".

Frankly I see nothing unfair in Condition 38; it is what the parties agreed. Moreover, it is not a unique type of clause: see, e.g. *Hudson, op. cit.* at pages 164 (*Hoffman* v. *Meyer*[1]); 444 (*Ballantine* v. *Western Hotels (Pty.) Ltd.*,[2]); the foot of page 490 and page 491.

If the defendants' advocate were correct in asserting that Condition 38 is invalid, it avails his clients nothing because without Condition 38 the defendants are bereft of even a vaguely arguable source of arbitration entitlement.

The right to arbitration rests exclusively in agreement.

Somewhat ironically, a paragraph in one of the affidavits filed on behalf of the defendants points out " ..... it is the *prima facie* duty of the court to act upon the agreement ..... " Unfortunately for the defendants, acting on the agreement entails acknowledging that the defendants are in no position to force an arbitration on the plaintiffs.

My decision in effect is then that instead of forcing the plaintiff to arbitrate or abandon its claim, the defendants must submit to litigation.

The letter dated March 2, 1982 from the defendants' advocates to the Architect and the Architect's reply thereto dated March 4, 1982

This particular exchange of correspondence has already been touched upon.

For present purposes the only parts of the letter of March 2, 1982 which are relevant are the following:

"We refer to our recent discussions with you in this matter. We enclose a copy of the Writ of Summons and would be obliged to have your comments on the following:

3. *Letter of November 29, 1979*

'Paragraph 2 of the Statement of Claim mentions, *inter alia*, that Akitek Bersatu determined such dispute.'

We would be obliged if you will comment on this generally and also please answer the following:

a) Was the dispute ever referred to arbitration under Clause 38 of the contract dated July 27, 1977?

b) Did the defendant agree to any submission to arbitration pursuant to said Clause 38?

c) Does the letter dated November 29, 1979 constitute an award pursuant to Clause 38?

4. If the answer to above is No, does the letter dated November 29, 1979 constitute in any way to final and conclusive evidence/or fact that the defendant does owe the plaintiff the said sum of $21,836?

Our client takes the stand that this action is misconceived in law and the Contractor has no claim against our client whatsoever, and in as much as there has been no final adjudication of the matter, the Contractor's claim in *quantum meruit* also cannot succeed. We propose to take this stand with Messrs. Yong Wong & Chin and if they will not agree this, the matter may well to be litigated in court and we may have to bring Third Party proceedings against your firm."

So much of the Architect's letter of March 4, 1982 as follows is relevant:

"3. Letter of November 29, 1979 – This letter was not written at anyone's request.

a. No dispute has ever been referred to us by either party.

b. The final Certificate No. 6 was issued on December 1, 1978. The first indication that there was any disagreement on the part of the owner, was his letter to Yong Wong & Chin on June 16, 1979, 6½ months after the certificate was issued. There were repeated reminders from us, that he should honour the certificate.

c. In any event the Arbitration Clause states "then the architect shall determine such dispute or difference by *a written decision given to the contractor*". At no time have we given such a written decision to the contractor. The letter of November 29, 1979 was not even copied to the contractor.

d. In our opinion arbitration procedure, is the method laid down in the contract for the settlement of a

dispute. However we must point out that an arbitrator must be nominated and appointed by agreement between the Architect and the Contractor, in the first instance, and of course the Architect must be aware that there is a dispute.

4. No reply required in view of the above.

For a start, I think the Architect's letter has to be considered in the light of the Architect having been made aware that Third Party proceedings might be commenced against his firm. The Architect is thus placed in a position where he has an incentive to run for cover. I am certainly not saying that the Architect has in fact allowed himself to be influenced, but a potential conflict of interest and duty is now discernible.

The questions posed for the Architect by the defendants' advocate are at the least questions of mixed law and fact, and some of them border on being pure questions of law only. If an attempt were made to ask such questions in a court of law, they would be disallowed, because courts do not allow witnesses to express opinions on either questions of law or questions of mixed law and fact. The Architect is no doubt an expert on architecture and could be asked to express opinions on that topic, but his opinion on problems incorporating elements of law is irrelevant. Just because he expresses those opinions in a letter out of court obviously does not give them any extra weight. If anything, the reverse would be the case.

Accordingly, I have disregarded the opinon of the Architect in the passages I have set out above from his letter of March 4, 1982.

Conclusion

For the reasons elaborated above, the defendants' motion stands dismissed.

It having been agreed that costs should follow the event, the plaintiff is to have its costs which are to be taxed, if not agreed.

Order accordingly.

Solicitors: *Yong, Wong & Chin; Hilborne Hawkin & Co.*